Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Todd Allen Myklebust,

Petitioner,

v.

State of Oregon,

Respondent.

On Petition for Writ of Certiorari

To The Oregon Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Jay W. Frank

Counsel of Record

MOULE & FRANK, Lawyers

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Eugene, OR 97401

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth and Fourteenth Amendments to the Constitution of the United States require a jury verdict of guilty on a felony charge of manslaughter in the second degree in a state court trial to be unanimous.

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PETITION FOR A WRIT OF CERTIORARI

Todd Allen Myklebust respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case.

ORDERS BELOW

The circuit court's oral denial of petitioner's motion to require jury unanimity (App. 3 - App. 4, App. 12 - App. 13)) is unreported. The affirmance without opinion by the Oregon Court of Appeals is reported at 210 Or.App. 756, 153 P.3d 178 (App. 1). The denial of discretionary review by the Supreme Court of Oregon is reported at 343 Or. 224, 168 P.3d 1155 (App. 5).

JURISDICTION

The Supreme Court of Oregon denied review October 4, 2007. The statutory provision which confers on this Court jurisdiction to review on a writ

of certiorari the judgment or order in question is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTE

Oregon Revised Statutes ("ORS") 136.450(1) states, in pertinent part, that "the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors."

Article I, section 11 of the Oregon Constitution states, in pertinent part, that "in the circuit court ten members of the jury may render a verdict of guilty or not guilty."

The Sixth Amendment to the Constitution of the United States states: "In all criminal prosecutions, the accused shall enjoy a right to a ... trial, by an impartial jury ...

Section 1 of the Fourteenth Amendment to the Constitution of the United States states:

> .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CASE

Petitioner was indicted on a felony charge of manslaughter in the second degree. (App. 10). He moved the court, prior to trial, for an order directing that, notwithstanding ORS 136.450(1) and Article I, § 11, of the Oregon Constitution, any verdict of conviction by the trial jury on the felony charge of manslaughter in the second degree must be "confirmed by the unanimous suffrage" of each and every one of the 12 jurors. (App. 6, App. 12). He also submitted a brief containing the following

argument in support of his motion:

* * * * *

> Notwithstanding Apodaca [v. Oregon, 406 U.S. 404 (1972)], ORS 136.450(1), and Article I, § 11, of the Oregon Constitution, any verdict of conviction by the trial jury on count 1 [manslaughter in the second degree] must be "confirmed by the unanimous suffrage" of each and every one of the 12 jurors. Blakely [v. Washington], 124 S.Ct. [2531 (2004),] at 2536.

(App. 7 -App. 8, App. 12 - App. 13).

Petitioner's attorney reiterated the foregoing argument at a pretrial hearing on the motion. (App. 3 - App. 4, App. 12) The trial court denied the motion, stating: "I deny the request." (App. 4, App. 12).

The jury found petitioner guilty of manslaughter

in the second degree by a vote of 10 to 2 at trial. (App. 11). The court sentenced petitioner to serve 75 months in prison. (App. 11)

Petitioner appealed to the Oregon Court of Appeals, and in his second assignment of error sought review of the trial court's denial of his motion for jury unanimity. (App. 9 - App. 14). The Oregon Court of Appeals affirmed without opinion. (App. 1).

Petitioner petitioned the Supreme Court of Oregon for review; the second legal question presented for review was "whether the Sixth and Fourteenth Amendements to the Constitution of the United States require that any jury verdict of guilty of a felony must be unanimous." (App. 15 - App. 18). The Supreme Court of Oregon denied review. (App. 5).

REASONS FOR ALLOWANCE OF THE WRIT

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), five Justices of this Court, including Justice Powell, concluded that unanimity is an indispensible feature of every criminal jury trial in federal court, pursuant to the Sixth Amendment; and eight Justices concluded that the concept of a jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment. *Apodaca*, 406 U.S. at 414-415 (Stewart, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 366, 369-380 (1972) (Powell, J., concurring in the judgment); *Johnson*, 406 U.S. 380, 380-394 (1972) (Douglas J., dissenting); *Johnson*, 406 U.S. 395, 395-396 (1972) (Brennan J., dissenting); *Johnson*, 406 U.S. 399, 406 U.S. 399, 399-403 (1972) (Marshall, J., dissenting). However, Justice Powell, one of the five member majority on the

former question, disagreed with all of the other eight Justices on the latter question, and concluded that unanimity is not an indispensible feature of jury trials in state courts, as opposed to jury trials in federal courts. *Johnson*, 406 U.S. at 369-380 (Powell, J., concurring in the judgment).

As a result of Justice Powell's singular conclusion that unanimity is required in criminal trials in federal courts, but not in such trials in state courts, persons accused of crimes in the federal courts of Oregon and all other states during the past 35 years have had a right to unanimous jury verdicts, while identically situated persons accused of crimes in the state courts of Oregon have been deprived of the same right.

In *Blakely v. Washington*, 542 U.S. 296 (2005), this Court stated:

> This case requires us to apply the rule we

expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that *the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,"* 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no

accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

(Emphasis added). 542 U.S. at 301-302.

Apodaca was decided wrongly. *See Blakely*, 542 U.S. at 301-302; *Apodaca*, 406 U.S. at 414-415 (Stewart, J., dissenting); *Johnson*, 406 U.S. 380, 380-394 (Douglas J., dissenting); *Johnson*, 406 U.S. 395, 395-396 (Brennan J., dissenting); *Johnson*, 406 U.S. 399, 406 U.S. 399, 399-403 (Marshall, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jay W. Frank

Counsel of Record

MOULE & FRANK

Lawyers

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December 2007

FILED: January 31, 2007

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent

v.

TODD ALLEN MYKLEBUST,

Defendant-Appellant.

Douglas County Circuit Court

03CR2119FE

A130984

William L. Lasswell, Judge

Argued and submitted: January 12, 2007

Before Edmonds, Presiding Judge, and Wollheim, Judge, and Riggs, Senior Judge

Attorney for Appellant: Jay W. Frank

Attorney for Respondent: Kaye E. McDonald

AFFIRMED WITHOUT OPINION.

* * * * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF DOUGLAS

STATE OF OREGON,	)	
Plaintiff,	)	Douglas County
vs.	)	Case No.
TODD ALLEN MYKLEBUST,	)	03CR2119FE
	)	Court of
Defendant.	)	Appeals
	)	Case No.
	)	A127881

BE IT REMEMBERED that the above-entitled matter came on for hearing on the 30th day of November, 2004, in Circuit Court ... Douglas County ..., before the HONORABLE WILLIAM L. LASSWELL, Judge Presiding.

APPEARANCES

TIMOTHY BARNACK, Deputy District Attorney, Medford, Oregon, appearing in behalf of the Plaintiff.

JAY W. FRANK, Attorney at Law, Eugene, Oregon, appearing in behalf of the Defendant.

(Whereupon the following proceedings tooplace before the Court, to wit:)

THE COURT: This is the time set for the trial of the case of State of Oregon versus Todd Allen Myklebust. ...

* * * * *

THE COURT: There are a number of pretrial matters that we're to consider ...

* * * * *

MR. FRANK: ... I did file a document entitled ... "defendant's motions." ... That was on or about August 17th, 2004. ...

* * * * *

MR. FRANK: Your Honor, my next issue ... is more for the record, but I move[d] to require jury unanimity on count one based on some language in the recent Supreme Court decision ... Blakely versus Washington, and I explain that in Apodac[a] versus Oregon ... from 1972, 406 U.S. 404, there was a plurality of Justices of the Supreme Court that said jur[ies] don't have to be unanimous under the sixth amendment. There was another Justice, Justice Powell, who [held] that even though jury unanimity was required under the sixth amendment that that aspect of the right to jury trial wasn't applicable to the states, and as a result Oregon was permitted to have non-unanimous juries in felony cases. However, in Blakely versus Washington decided last summer, 124 S Court 2531, at page 2536, a majority of five

justices state that the truth of every ac[cu]s[a]tion against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, quoting Blackstone. And so my argument is that Apodac[a] is no longer good law. The Oregon statute 136.450 sub 1, and article [I] section 11 of the Oregon constitution are unconstitutional in light of Blakely, adn therefore a unanimous verdict should be required.

MR. BARNACK: I don't have any response on that, your Honor.

THE COURT: I deny the request.

App. 6

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent, Respondent on Review

v.

TODD ALLEN MYKLEBUST

Defendant-Appellant, Petitioner on Review

Court of Appeals

A130984

S054663

ORDER DENYING REVIEW

Upon consideration by the court,

The court has considered the petition for review and orders that it be denied.

October 4, 2007 /s/ Paul J. De Muniz

CHIEF JUSTICE

c: Kaye Ellen McDonald

Jay W Frank

FILED
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DOUGLAS COUNTY
TRIAL COURTS

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DOUGLAS COUNTY

THE STATE OF OREGON,	)	Case No.
Plaintiff,	)	03CR2119FE
vs.	)	DEFENDANT'S
TODD ALLEN	)	MOTIONS
MYKLEBUST,	)	
Defendant.	)	

* * * * *

Defendant respectfully moves the court for an order directing that, notwithstanding ORS 136.450(1), and Article, I, § 11, of the Oregon Constitution, any verdict of conviction by the trial jury on count 1 must be "confirmed by the

unanimous suffrage" of each and every one of the 12 jurors.

* * * * *

The foregoing motions are supported by the attached ... brief, ... which [is] incorporated herein by reference.

Respectfully submitted,

MOULE & FRANK,

Lawyers

/s/ Jay W. Frank

Jay W. Frank

Attorney for Defendant

Bar No. 79042

Phone: (541) 485-1311

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR DOUGLAS COUNTY

THE STATE OF OREGON,	)	Case No.
Plaintiff,	)	03CR2119FE
vs.	)	BRIEF
TODD ALLEN MYKLEBUST,	)	
Defendant.	)	

* * * * *

MOTION TO REQUIRE JURY UNANIMITY ...

* * * * *

In Apodaca v. Oregon, 406 U.S. 404... (1972), a plurality of four Justices of the Supreme Court of the United States (Justice White, Chief Justice Burger, Justice Blackmun and Justice Rehnquist) concluded that the Sixth Amendment guarantee of a jury trial, made applicable to the states by the Fourteenth Amendment, does not require that the

jury's vote be unanimous. 406 U.S. at 405-412. A fifth Justice, Justice Powell, concluded that, although on the basis of history and precedent the Sixth Amendment mandates unanimity in a federal jury trial, the Due Process Clause of the Fourteenth Amendment, while requiring states to provide jury trials for serious crimes, does not incorporate all the elements of a jury trial within the meaning of the Sixth Amendment and does not require jury unanimity. Johnson v. Louisiana, 406 U.S. 366, 369-375 ... (1972).

In Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 2531 ... (2004), a majority of five Justices of the Supreme Court of the United States, none of whom were members of the Supreme Court in 1972, stated:

> This case requires us to apply the rule we expressed in Apprendi v. New Jersey, 530

U.S. 466, 490, ... (2000), "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure §

87, p. 55 (2d ed. 1872).

(Emphasis added). 124 S.Ct. at 2536.

Notwithstanding Apodaca, ORS 136.450(1), and Article I, § 11, of the Oregon Constitution, any verdict of conviction by the trial jury on count 1 must be "confirmed by the unanimous suffrage" of each and every one of the 12 jurors. Blakely, 124 S.Ct. at 2536.

Respectfully submitted,

MOULE & FRANK,

Lawyers

/s/ Jay W. Frank

Jay W. Frank

Attorney for Defendant

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,	)	
Plaintiff-Respondent,	)	Douglas County
v.	)	Circuit Court No.
TODD ALLEN	)	03CR2119FE
MYKLEBUST,	)	CA A130984
Defendant-Appellant.	)	

APPELLANT'S BRIEF AND EXCERPT OF RECORD

Appeal from a judgment of the Circuit Court for Douglas County;

Honorable WILLIAM L. LASSWELL, Judge.

JAY W. FRANK, Attorney for Appellant

Moule & Frank, Lawyers

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01/23/06

* * * * *

APPELLANT'S BRIEF

STATEMENT OF THE CASE

The nature of the action or proceeding, the relief sought and the indictment, ...

Defendant Todd Allen Myklebust ("defendant") seeks reversal in this criminal case of his conviction for manslaughter in the second degree ...

Defendant was accused by indictment of the

offenses of manslaughter in the second degree ..., and driving while under the influence of intoxicants ("DUII"), committed as follows:

COUNT 1

The said TODD ALLEN MYKLEBUST, on or about the 23rd day of November, 2003, in said County of Douglas and State of Oregon, then and there being, did unlawfully and recklessly cause the death of another human being, to-wit: Dennis Clayton Zuver, by colliding into a tree causing portions of said tree to fall into a public highway, ...;

* * * * *

The nature of the judgment sought to be reviewed, and the fact that trial was before a jury

On November 30, 2004, defendant pled guilty to the charge of DUII (count 2) and, thereafter, trial

commenced before a jury on the charge of manslaughter in the second degree (count 1). On December 2, 2004, the jury found defendant guilty of manslaughter in the second degree by a vote of 10-2. ...

On December 20, 2004, at sentencing, the Honorable William L. Lasswell, Circuit Court Judge, (1) adjudged that defendant had been convicted of manslaughter in the second degree on the basis of the aforementioned jury verdict; ...; sentenced defendant, ..., to serve 75 months in prison; ordered that defendant may not receive credit for time served, or be considered for alternatives to incarceration or alternative sanctions, ...; [and] suspended execution of defendant's sentence pending appeal; ...; and (2) adjudged that defendant had been convicted of DUII on the basis of the aforementioned guilty plea; ...;

sentenced defendant to serve 30 days in jail; ...; [and] ordered that this sentence shall be concurrent with the foregoing sentence on the conviction for manslaughter in the second degree; ....

* * * * *

A brief statement of questions presented on appeal

* * * * *

4. Do the Sixth and Fourteenth Amendments to the Constitution of the United States require that any verdict of guilty of manslaughter in the second degree must be unanimous?

* * * * *

A concise summary of the arguments appearing in the body of the brief

* * * * *

4. The Sixth and Fourteenth Amendments

to the Constitution of the United States require that any verdict of guilty of manslaughter in the second degree must be unanimous.

* * * * *

SECOND ASSIGNMENT OF ERROR

The trial court erred in denying defendant's motion to require jury unanimity for conviction on count 1.

A. Preservation of Error

> Defendant respectfully move[d] the court for an order directing that, notwithstanding ORS 136.450(1) and Article I, § 11, of the Oregon Constitution, any verdict of conviction by the trial jury on count 1 must be "confirmed by the unanimous suffrage" of each and every one of the 12 jurors.

.... A brief in support of the motion stated:

> Notwithstanding Apodaca, ORS 136.450(1), and Article I, § 11, of the Oregon Constitution, any verdict of conviction by the trial jury on count 1 must be "'confirmed by the unanimous suffrage" of each and every one of the 12 jurors. Blakely, 124 S.Ct. at 2536.

.... At the hearing on the motion, defendant's attorney reiterated the foregoing argument. ... The trial court denied the motion, stating: "I deny the request." ...

* * * * *

ARGUMENT

In Apodaca v. Oregon, 406 U.S. 404 ... (1972), a plurality of four Justices of the Supreme Court of the United States (Chief Justice Burger, and Justices White, Blackmun, and Rehnquist) concluded that the Sixth Amendment guarantee of

a jury trial, made applicable to the states by the Fourteenth Amendment, does not require that a jury's vote be unanimous. 406 U.S. at 405-412. A fifth Justice, Justice Powell, concluded that, although on the basis of history and precedent the Sixth Amendment mandates unanimity in a federal jury trial, the Due Process Clause of the Fourteenth Amendment, which requires states to provide jury trials for serious crimes, does not incorporate all the elements of a jury trial within the meaning of the Sixth Amendment, and does not require jury unanimity. Johnson v. Louisiana, 406 U.S. 366, 369-375 ... (1972).

In Blakely v. Washington, 542 U.S. 296, 301 ... (2004), a majority of five Justices of the Supreme Court of the United States, none of whom were members of the Supreme Court in 1972, stated:

This case requires us to apply the

rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 ... (2000); "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that **the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors,"** 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any

> particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

(Emphasis added).

The Sixth and Fourteenth Amendments to the Constitution of the United States required jury unanimity for a conviction on count 1. Blakely, 542 U.S. at 301.

* * * * *

Respectfully submitted,

MOULE & FRANK,

Lawyers

/s/ Jay W. Frank

Jay W. Frank

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	
Respondent on Review,	)	Douglas County
v.	)	Circuit Court No.
TODD ALLEN	)	03CR2119FE
MYKLEBUST,	)	CA A130984
Petitioner on Review.	)	

PETITION FOR REVIEW

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Douglas County; Honorable WILLIAM L. LASSWELL, Judge.

AFFIRMED WITHOUT OPINION: January 31, 2007

Before EDMONDS, Presiding Judge

WOHLHEIM, Judge

RIGGS, Senior Judge

JAY W. FRANK, Attorney for Appellant

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* * * * *

Concise statements of the legal questions presented on review and of the rules of law that the petitioner proposes be established, if review is allowed.

* * * * *

2. The second legal question is whether the Sixth and Fourteenth Amendments to the Constitution of the United States require that any jury verdict of guilty of a felony must be unanimous. The rule of law that defendant proposes be established is that the Sixth and Fourteenth Amendments to the Constitution of the United States requires [sic] that any jury verdict of guilty of a felony must be unanimous.

* * * * *

A brief argument concerning the legal questions presented on review.

* * * * *

2. In Apodaca v. Oregon, 406 U.S. 404 ... (1972), a plurality of four Justices of the Supreme Court of the United States (Chief Justice Burger, and Justices White, Blackmun, and Rehnquist) concluded that the Sixth Amendment guarantee of

a jury trial, made applicable to the states by the Fourteenth Amendment, does not require that a jury's vote be unanimous. 406 U.S. at 405-412. A fifth Justice, Justice Powell, concluded that, although on the basis of history and precedent the Sixth Amendment mandates unanimity in a federal jury trial, the Due Process Clause of the Fourteenth Amendment, which requires states to provide jury trials for serious crimes, does not incorporate all the elements of a jury trial within the meaning of the Sixth Amendment, and does not require jury unanimity. Johnson v. Louisiana, 406 U.S. 366, 369-375 ... (1972).

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> This case requires us to apply the

rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 ... (2000); "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that **the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors,"** 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any

> particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

(Emphasis added).

The Sixth and Fourteenth Amendments to the Constitution of the United States required jury unanimity for a conviction of a felony. Blakely, 542 U.S. at 301.

Respectfully submitted,

MOULE & FRANK,

Lawyers

Jay W. Frank

Jay W. Frank

Attorney for [Petitioner]